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NG HOY KEONG

v.

CHUA CHOON YANG & ORS

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HIGH COURT MALAYA, SHAH ALAM
HINSHAWATI SHARIFF JC
[ORIGINATING SUMMONS NO: MT5-24-1196-2008]
25 MARCH 2010

C ***COMPANY LAW:*** *Derivative action - Application for leave to defend on behalf of defendant company - Whether notice to defendants can be abridged - Whether non-compliance of notice period mere irregularity - Whether provision of s. 355(4) of the Companies Act 1965 applicable to s. 181B(2) of the same Act*

D ***COMPANY LAW:*** *Derivative action - Application for leave to defend on behalf of defendant company - Whether plaintiff demonstrated a prima facie case - Whether plaintiff acting in good faith - Whether leave can be granted although not prayed for in the originating summons*

E The plaintiff, the 1st and 2nd defendants were the directors of the 3rd defendant. The defendants had engaged a contractor ('Satujaya') for a land development project and were later sued for monies due and owing to Satujaya. The plaintiff discovered that the sum claimed by Satujaya were inflated and applied *inter alia* F for leave to defend the 3rd defendant in the suit. However, the plaintiff had only given nine days notice to the defendants and not 30 days as prescribed by s. 181B(2) of the Companies Act 1965 ('the Act'). The plaintiff applied for the court to abridge the notice period pursuant to s. 355(4) of Act. The defendant contended G that the 30 days notice period was mandatory and the court had no discretion to waive or abridge or enlarge the notice period. The plaintiff had also submitted for leave to defend in another suit ('Semangat Tinggi suit'). The issue to be determined were (i) whether the notice period could be abridged and; (ii) whether the H leave to defend could be granted to the plaintiff.

Held (allowing the plaintiff's application):

(1) The intention behind s. 181B(2) of the Act was to ensure I that the defendants were not taken by surprise. The plaintiff's non-compliance must be treated as a mere irregularity provided that no injustice was caused to the defendants as a result of the short notice period. (para 13)

(2) Since s. 355(4) is found under the 'General' heading of the Act, it is clear that the intention of the legislature is to incorporate the provision for a general application of the Act. The provision of s. 355(4) was used and the abridgment of time was granted. (para 14)

(3) The plaintiff had demonstrated *prima facie* case on the contention. He had also shown sufficient evidence that he was acting in good faith. Furthermore, the facts disclosed in the plaintiff's affidavit regarding his claim against Satujaya could only be determined at a full trial. Therefore, the leave to defend was granted to the plaintiff. (para 21)

(4) The plaintiff's application for leave to defend in the Semangat Tinggi suit was not allowed as it was not prayed for in the originating summons. (para 22)

Case(s) referred to:
Agus Irawan v. Toh Tech Chye & Ors [2002] 2 SLR 198 ***(refd)***
Mohd Shuaib Ishak v. Celcom (Malaysia) Berhad [2008] 1 LNS 314 HC ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 181A, 181B(2), (4), 355(4)

For the plaintiff - Harvinderjit Singh; M/s D'Cruz & Brian
For the defendant - Moses Susayan; M/s Raja Badrul, Ramli & Azizi

Reported by Melinda Robert

JUDGMENT

Hinshawati Shariff JC:

[1] For convenience of references, the Kuala Lumpur Sessions Court Summons No. S6-52-26026-2008 is hereinafter referred to as the Semangat Tinggi Suit, the Shah Alam High Court MT2 22-744-2008 as the Satujaya Suit and the Originating Summons which is before me as this suit. The third defendant in this suit is also the defendants in the Satujaya and the Semangat Tinggi Suits.

[2] The plaintiff is one of the three directors of the third defendant. He is the registered owner of 125,000 ordinary shares (representing 50% of its issued and paid-up capital) and the first defendant is the registered owner of the other 50%. The second defendant is the third director. It is of relevance to note at this

stage that the third defendant was the vehicle set up to facilitate a joint venture partnership between the plaintiff and a certain Patrick Wong Ha ("Patrick") whereby the plaintiff would, *inter alia*, use his land broker connections to secure property development undertaken by the third defendant whilst Patrick would contribute his knowledge and experience in the construction and development industry. Satujaya Sdn Bhd which is owned by Patrick would act as the main contractor in the project.

[3] Initially the plaintiff and Patrick contributed equally towards the issued paid up capital of the third defendant but Patrick's stake was held by his wife as his nominee. Subsequently these shares were transferred by her to the first defendant. This was apparently done with the agreement of the plaintiff.

[4] Subsequent events show that in 2005, the third defendant was given the opportunity to take over and complete a commercial property development in Sungei Buloh ("the project"). The undisputed facts as far as the project was concerned were as follows - the acquisition of the twenty acres of land for the project which had been subdivided into eighty-nine parcels of industrial lots, were equally financed by the plaintiff and Patrick; that Satujaya Sdn Bhd was appointed as the main contractor for the project and the project was financed by loan obtained by the third defendant from Eon Bank Berhad.

[5] Further events began to unfold when at the end of September 2007, the plaintiff with the consent of Patrick, the first and the second defendants, enlisted the help of the plaintiff's wife to examine the books and statements of accounts of the third defendant. As a result of this exercise the plaintiff alleged that he had discovered a payment of RM500,000 had been approved by Patrick and/or the first defendant as well as the second defendant to a company called Care Folio Sdn Bhd ("CF"). Five payment vouchers showing proof of this allegation were produced and marked as exhs. "NHK18", NHK19", "NHK20", "NHK21" and "NHK22" in encl. 2. CF it was said is a dormant company and has no business activity. The plaintiff further alleged that subsequent investigations then showed that this money had been paid to one Siew Kee, a director and shareholder of Satujaya Sdn Bhd.

[6] In November 2007, the plaintiff filed Originating Petition No. D4-26-129-2007 at the Kuala Lumpur High Court ("the oppression petition"). An ad-interim order was granted whereby

the first defendant, the second defendant and Patrick were required to put the plaintiff on notice of all outgoing payments to be made by the third defendant. A subsequent order was then made allowing the plaintiff to inspect all documents, books and accounts of the third defendant ("the inspection order") and an interlocutory injunction to, *inter alia*, restrain Patrick, the first defendant and the second defendant from operating and/or carrying on any business or transaction relating to three current accounts and/or opening any other banking accounts on behalf of third defendant without the approval of the plaintiff ("the injunction order").

[7] The rift between the parties deepened when, after the grant of the inspection and injunction orders, demand letters dated 17 March 2008, 25 March 2008 and 15 April 2008 were sent to the third defendant by Satujaya Sdn Bhd claiming the sum of RM5,814,704.57 in respect of progress claims nos. 5 to 9 submitted for works done in the project. The plaintiff did not agree to pay these amounts as he was of the view that based on documentary evidence, there was every reason to believe that the amounts had been inflated.

[8] The Satujaya suit was filed on 9 May 2008 and judgment in default was recorded on 28 May 2008. A garnishee order to show cause was issued to the third defendant but before this is heard, the plaintiff had filed this suit. On 16 September 2008 after hearing submissions from the learned counsels, I granted a stay of all proceedings in the Satujaya suit pending the hearing and disposal of encl. 1 in this suit.

[9] By way of encl. 1, the reliefs that the plaintiff seeks are, *inter alia*, as follows:

(i) An order that the 30 days' notice to the directors of the third defendant pursuant to sub-s. 181B(2) of the Companies Act, 1965, be abridged;

(ii) An order that the plaintiff be granted leave to defend the Satujaya suit and/or counterclaim or issue fresh proceedings, on behalf of the third defendant in relation thereto; and

(iii) An order that the first and second defendants provide assistance and information to the plaintiff including the inspection of all books and records of the third defendant.

[10] As was admitted by Mr Harvinderjit Singh, the learned counsel for the plaintiff, the plaintiff had given only nine days' notice to the first and second defendants, thereby rendering this notice not in compliance with sub-s. 181B(2) of the Companies Act 1965 (Act 125). For completeness, the said sub-s. 181B(2) is reproduced as follows:

> 181B. Leave of Court
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> (1) An application for leave of the Court under section 181A shall be made by Originating Summons and no appearance need to be entered;
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> (2) The complainant shall give thirty days notice in writing to the directors of his intention to apply for the leave of Court under section 181A;
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> (3) Where leave has been granted pursuant to an application under section 181A, the complainant shall initiate proceedings in Court within thirty days from the grant of leave;
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> (4) In deciding whether or not leave shall be granted the Court shall take into account whether:
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> (a) The complainant is acting in good faith;
>
> (b) It appears *prima facie* to be in the best interest of the company that the application for leave be granted.

[11] Mr Harvinderjit Singh submitted that sub-s. 181B(2) must be read with sub-s. 355(4) of the same Act, for reading otherwise would he said, lead to an ambiguity. Subsection 355(4) is contained in Part XII under the heading "General" and it is in relation to 'Enforcement Of Act'. The said subsection specifically empowers the court to " ... enlarge or abridge any time for doing any act or taking any proceeding allowed or limited by this Act upon such terms, if any, as the justice of the case may require and any such enlargement may be ordered although the application for the same is not made until after the time originally allowed or limited".

[12] The learned counsel for the defendants, Mr Moses Susayan on the other hand, submitted that compliance with sub-s. 181B(2) is mandatory and the court has no discretion to either waive or abridge or enlarge the period of giving such notice. Mr Moses said a comparison must drawn between sub-s. 181B(2) with similar

provisions found in the Hong Kong, Singapore and the Canadian legislations wherein they have specific provisions to either abridge the period or dispense with the notice altogether. A

[13] I accept Mr Moses's submission on the comparison between our own sub-s. 181B(2) with those found in the countries mentioned. I have, however, come to a different conclusion on that point. In my view, the fact that the Hong Kong, Singapore and Canadian legislations have specific provisions empowering the court to grant abridgment of time or dispensation of notice appear to reiterate the point that an application need not necessarily be shut out from obtaining this relief simply because it had not complied with the time specified for the giving of such notice. It is clear that the intention of sub-s. 181B(2) is not to take the directors by surprise and, therefore, the party wanting to obtain leave of court under s. 181A must notify the directors of his intention to do so. The underlying principle must in my view be, that so long as no injustice has been caused to the party as a result of the non-compliance of the other party, then such non-compliance must be treated as a mere irregularity. B C D

[14] In addition, it is also my view that sub-s. 355(4) does provide a way out of the predicament as the one faced by the plaintiff here. As I had mentioned earlier, this provision is found under the heading 'General' and that fact must be given importance for it is obvious that it was the intention of the legislature to incorporate that provision for a general application of the Act. In fact, this conclusion is very obvious from the wordings of sub-s. 355(4) itself. I do not think I need to say more on this issue except to say that I am in agreement with the submission of Mr Harvinderjit Singh that sub-s. 355(4) empowers the court to enlarge or abridge time for the doing of any act allowed or limited by the Act such as that provided by sub-s. 181B(2). In passing, I would add that perhaps it is because there is already a provision in the form of sub-s. 355(4) that the drafters in coming up with the new sub-s. 181B(2) did not think it necessary to have a specific provision for either the abridgement or enlargement of time which is specific to sub-s. 181B(2). E F G H

[15] I now come to the second part of the application, which is, whether or not leave should be granted under s. 181B(2) of the same Act. This section is to the following effect: I

> (4) In deciding whether or not leave shall be granted the Court shall take into account whether:

A (a) the complainant is acting in good faith; and

(b) it appears *prima facie* to be in the interest of the company that the application for leave be granted.

[16] The plaintiff is asking to be allowed to defend on behalf of
B the third defendant in the Satujaya suit. Satujaya is claiming for the sum of RM5,814,704.57 purportedly due and owing under progress claims nos. 5 to 9. At para. 47 in his affidavit affirmed on 5 June 2008 (encl. 2), the plaintiff had averred that upon being granted the inspection order and thereafter after having
C inspected Satujaya's progress claims nos. 1 to 4, he had discovered that progress claim no. 4 contains figures much higher and inconsistent with progress claims nos. 1, 2 and 3 in respect of the same scope of work. The plaintiff also discovered that Patrick, along with the first and second defendants had approved
D and made payments totalling RM6,888,357.27 on all those claims. At para. 48 of the same affidavit, the plaintiff also averred that the consultant architect has confirmed that they had not been given nor had they ever certified any of the said progress claims although it was purportedly claimed to be so by Satujaya. A copy
E of the letter dated 3 January 2008 from the consultant architect was shown as exh. "NHK3a" in the affidavit.

[17] The defendants, as was to be expected, contended that there was no inflation of the progress claims. They said that Satujaya
F had been appointed as the turnkey contractor for the project (para. 19 of encl. 8) and the amounts to be paid to Satujaya was in accordance with the agreed contract price at RM17,613,645. It was also contended by the defendants that the third defendant would issue contractor payment requests and recommendation and
G the amounts would be paid to Satujaya without certification by the project consultant.

[18] Arising from the position taken by the defendant, the plaintiff disclaimed that there is proof that Satujaya had been appointed as
H the turnkey contractor for the project. The plaintiff relied on, *inter alia*, the following grounds to show that the allegations of the defendants are afterthoughts:

(i) the defendants have failed to produce any evidence of a board of directors resolution formally appointing Satujaya as the
I turnkey contractor;

(ii) the turnkey agreement and supplementary agreement were stamped on 2 May 2008 and not at the material time which was on 15 March 2006;

(iii) the plaintiff is not a party to this agreement;

(iv) there was never any contract price; and

(v) the first time these agreements came to light were in the defendant's affidavit affirmed on 9 December 2008 (encl. 10).

[19] Learned counsel for the plaintiff and the defendants have conceded that 'good faith' and 'best interest' of the company as required under s. 181B(4) are indeed intertwined. The learned counsel for the defendants, however, went on further to say that over and above that fact, the court must be satisfied that the plaintiff has no ulterior motive in its pursuit of the derivation action. The learned counsel relied on the case of *Agus Irawan v. Toh Tech Chye & Ors* [2002] 2 SLR 198 in support of this proposition. The acts complained of which according to the learned counsel, constituted bad faith were one, that the plaintiff did not disclose in his affidavit the fact of the voluntary liquidation of the company and two, that his own company, Hoy Keong Engineering Sdn Bhd had benefited from the lump sum contract as a result of the payments on Satujaya's progress claims nos. 1 to 4.

[20] I would like at this stage, refer to the judgment of Ramly Ali J (as His Lordship then was) in the case of *Mohd Shuaib Ishak v. Celcom (Malaysia) Berhad* [2008] 1 LNS 314 as the starting point in determining this application for leave under s. 181A of the Companies Act. His Lordship said:

> (113) In an action for leave under s. 181A of the Act, a complaint had to show that he was acting in good faith, and that it was in the *prima facie* in the interests of the company that the action be brought The complainant had to demonstrate that there was a reasonable basis for the complaint and that the proposed action was legitimate and arguable, in that it had a reasonable semblance of merit. It should also be remembered that this is an application for leave. The plaintiff is required to prove his case on merits.
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> (114) At the leave stage, which is the threshold stage, the court is not to go into substantial issues on merits. All the applicant has to do is to follow the threshold requirement by showing a *prima*

A *facie* case and that the application is not vexatious and frivolous. There must be some substance in the grounds supporting the application.

(115) The court should grant leave if it is clear that there is a point for further investigation on a full *inter partes* basis with all such evidence on the facts and all such arguments as is necessary on the law.

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[21] Based on the facts that have been presented in this case, I am satisfied that the plaintiff had demonstrated a *prima facie* case on the complaint. The plaintiff has also shown sufficient evidence that he is acting in good faith in bringing this application. In view of the many disputed facts as disclosed in the affidavits filed by the plaintiff and the defendants, it is obvious that the issues can only be determined at a full trial. In order to do, I would grant the plaintiff leave to defend in the Satujaya suit.

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[22] I will have to also say that although in his submission, the learned counsel for the plaintiff had submitted for leave to defend in the Semangat Tinggi Suit, I have not allowed it for the reason that this was not prayed for in the originating summons.

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[23] Prayers (1), (2), (3), (4) and (6) of encl. 1 are, accordingly, allowed with costs.

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